UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

GARNER/MORRISON, LLC and INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL, #15, LOCAL UNION #86, AFL-CIO-CLC	Case 28-CA-21311
SOUTHWEST REGIONAL COUNCIL OF CARPENTERS and INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL, #15, LOCAL UNION #86, AFL-CIO-CLC	Case 28-CB-6585

RESPONDENT GARNER/MORRISON, LLC'S MOTION FOR RECONSIDERATION

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Pursuant to the Board's Rules and Regulations, Respondent Garner/Morrison, LLC ("G/M") moves for reconsideration of the Board's Decision and Order dated May 27, 2011, and reported at 356 NLRB No. 163 in the above-captioned cases.[1] This Decision and Order was issued after the Court of Appeals for the District of Columbia Circuit remanded the Decision and Order of the two-member Board panel dated January 27, 2009, and reported at 353 NLRB 719.

I. MOTION FOR RECONSIDERATION

G/M moves for reconsideration of the Board's Decision and Order as follows:

First, G/M moves for reconsideration of the Board's finding that G/M engaged in unlawful surveillance at the April 2, 2007 meeting with G/M's painters and tapers wherein Carpenters' representatives solicited authorization cards from these employees. The ALJ found that G/M did not engage in such surveillance, but the Board rejected this finding, citing Moorehead City Garment Co., 94 NLRB 245, 255 (1951), enfd. 191 F.2d 1021 (4th Cir. 1951). The Board's reliance on Moorehead is misplaced because the facts are distinguishable from what occurred herein. The Board's misplaced reliance on Moorehead caused the Board to cursorily reject applicable Board precedent under Sunshine Piping, Inc., 350 NLRB 1186, 1184 (2007), that an employer's observations of employees' organization activities does not constitute unlawful surveillance where "employees elect to conduct their organizational activities openly." [356 NLRB No. 163, slip op. at p. 5.]

The Board refused to apply Sunshine Piping on the grounds that the "employees here did not elect to conduct their organizational activities openly." [356 NLRB No. 163, slip op. at p. 5.] However, the facts in the instant case compel a finding that G/M did not engage in unlawful surveillance at the April 2 meeting for the following reasons: (1) G/M's two owners were present at this meeting at the Carpenters' invitation; (2) G/M's representatives were not aware of any authorization card signing; (3) G/M's representatives were not in a position to and did not observe any authorization card signing; and (4) the tapers and painters were fully aware of the presence of G/M's representatives in the room when they engaged in the authorization card signing.

[1] In making this motion for reconsideration, Garner/Morrison, LLC does not waive any of the arguments it made in response to the exceptions to the ALJ's decision filed by the General Counsel and the Painters.

Second, G/M moves for reconsideration of the Board's finding that the alleged unlawful surveillance "tainted" the authorization cards and that G/M unlawfully assisted the Carpenters by recognizing the Carpenters as the Section 9(a) representative on the basis of such cards. As noted above, G/M has proven that no unlawful surveillance occurred. But even assuming arguendo that unlawful surveillance occurred, no evidence was offered that any employee's decision to sign an authorization card was influenced by the presence of G/M's representatives. Board precedent under Coamo Knitting Mills, Inc., 150 NLRB 579 (1964), mandates a finding that the presence of G/M's representatives at the April 2 meeting did not taint the authorization cards where G/M's representatives were unaware (in fact, clueless) of any authorization card signing and were not in position to observe it. As a result, Coamo compels that G/M did not violate Sections 8(a)(2) and (1) by recognizing the Carpenters on the basis of the authorization cards solicited by the Carpenters' representatives at the April 2 meeting.

Third, G/M moves for reconsideration of the Board's Decision and Order on the grounds that application of G/M's agreement with the Carpenters to the painters and tapers on April 1, 2007, after expiration of the Painters' agreements but before the April 2 meeting, created an 8(f) relationship vis-à-vis those employees. In this regard, the express terms of the Carpenters' agreement required automatic coverage of G/M's painters and tapers upon expiration of the Painters' agreements. The Carpenters agreement could only apply to the painters and tapers on a Section 8(f) basis. John J. Deklewa & Sons, 282 NLRB 1375, 1385 fn. 41 (collective bargaining agreements in the construction industry are presumed to be 8(f) contracts). Because application of the Carpenters' agreement on April 1 predated any Section 8(a)(2) violations occurring at the April 2 meeting, these purported 8(a)(2) violations could not vitiate application of the agreement to the painters and tapers. Zidell Explorations, Inc., 175 NLRB 887 (1969). Zidell holds that a pre-existing 8(f) relationship cannot be invalidated by subsequent acts of unlawful assistance.

This is significant because the Board's Remedy and Order prohibit G/M from recognizing the Carpenters as the collective bargaining representative of the tapers and painters, even on a Section 8(f) basis, absent a Board certification. [356 NLRB No. 163, slip op. at p. 7.] As such, the Board's Remedy and Order violate national labor policy promoting the enforcement of

collective bargaining agreements that are lawful and valid. The policy of labor relations stability in the Act "favors requiring parties to adhere to a voluntarily adopted collective bargaining agreement." Deklewa, supra, 282 NLRB at 1386. In Deklewa, the Board held that a collective bargaining agreement authorized by Section 8(f) would be enforceable during its term, and both the employer and union would be required to adhere to the agreement absent the union being decertified or replaced by another union in a Board-conducted election. Id. at 285. Here, by its terms, the Carpenters' agreement on April 1, 2007, applied to G/M's painters and tapers as a result of the expiration of the Painters' agreements. However, the Board's Remedy and Order invalidate the application of the Carpenters' agreement on the basis of alleged Section 8(a)(2) occurring on April 2. This result is not only contrary to Zidell, but it also departs from the national labor policy promoting the enforcement of lawful collective bargaining agreements. Accordingly, reconsideration of the Board's Remedy and Order is warranted because despite the fact that a lawful Section 8(f) relationship exists vis-à-vis G/M's painters and tapers, the Board's Remedy and Order prohibit G/M from recognizing the Carpenters even as the Section 8(f) representative of these employees absent a Board certification.

Fourth, reconsideration is warranted because the Board's Remedy and Order are contrary to the statute, vague and punitive. The Board's Remedy and Order forever preclude G/M and the Carpenters from entering into a Section 8(f) agreement covering G/M's painters and tapers. Because G/M is a construction industry employer, Section 8(f) and applicable precedent permit G/M and the Carpenters to enter into an 8(f) agreement covering G/M's painters and tapers, even in the absence of a Board election establishing the Carpenters as the Section 9(a) representative of those employees. As more fully set forth below, the Board's Remedy and Order prohibiting G/M and the Carpenters from entering into a Section 8(f) agreement (after each has complied with the other remedial provisions of the Board's Remedy and Order) are vague and exceed the Board's statutory authority because they are punitive.

Fifth, reconsideration is warranted because the Board's decision remands the April 9 alleged interrogation of Gary Servis to the ALJ. See 356 NLRB No. 163, slip op. at p. 8. The Board does so even though the ALJ already ruled on this issue upon its remand to the ALJ by the

original two-member Board panel in Garner/Morrison, LLC, 353 NLRB 719 (2009). See ALJ James M. Kennedy's "Decision on Remand" in Garner/Morrison, LLC, JD (SF)-15-09, dated April 13, 2009.

II. FACTUAL SUMMARY PERTINENT TO MOTION FOR RECONSIDERATION

A. Pre 2007 Collective Bargaining Background

G/M is engaged in the building and construction industry as a drywall installation and painting contractor. Its principals/owners are Cliff Garner, Gary Travis Garner, and Chris Morrison. After incorporating in November 2003 and hiring one carpenter employee, G/M entered into a 2002-2006 Memorandum Agreement ("2002 MOA") with the Carpenters on or about December 3, 2003. [356 NLRB No. 163, slip op. at pp. 2 and 10.]

The 2002 MOA bound G/M to the 2002-2006 Southern California/Arizona/Nevada Drywall/Lathing Master Agreement ("2002 Master Agreement"). [356 NLRB No. 163, slip op. at p. 2; Joint Exhibit 1, page 1, ¶ 1.] The 2002 Master Agreement covered all of the drywall hanging and finishing work performed by G/M's employees, which included any tapers' or painters' work. [356 NLRB No. 163, slip op. at p. 10; Joint Exhibit 1, p. 1, ¶ 1; Joint Exhibit 5, pp. 3-4.]

Thereafter, G/M hired painters and tapers and entered into two separate agreements with the Painters. The first agreement covering a tapers unit was entered into by G/M on April 15, 2004. [Joint Exhibit 13.] The second agreement covering a painters unit was entered into by G/M on November 5, 2004. [Joint Exhibit 11.] Both agreements were effective through March 31, 2007. [356 NLRB No. 163, slip op. at p. 2.] The Painters was not the exclusive collective bargaining representative of the tapers and painters employed by G/M under Section 9(a) of the Act. Instead, the Painters' agreements were Section 8(f) agreements. [356 NLRB No. 163, slip op. at p. 11.]

The 2002 Master Agreement between G/M and the Carpenters contained a "painters' exception" whereby the Carpenters waived coverage of its agreement over the tapers and painters only as long as G/M had a labor agreement with the Painters covering this work. This provision stated:

> The Union understands and recognizes that the WWCCA and its members are signatory to a collective bargaining agreement with the painters and/or plaster tenders covering drywall finishing and wet wall finish work. The parties agree that Article I, Section 6 [the work-covered clause] shall apply only to those signatory employers who are not already signatory to a collective bargaining agreement with the Painters and/or Plaster Tenders covering the drywall finishing or wet wall finish work as described in Article I, Section 6 of the agreement and who chose to assign that work to the Painters and/or Plaster Tenders. The Union agrees not to invoke or enforce Article I, Section 6 or to create any jurisdictional dispute concerning the work described in that section against any signatory employer that is also signatory to an agreement with the Painters and/or Plaster Tenders covering the drywall finishing or wet wall finish work and who chooses to assign that work to the painters and/or plasterers and plaster tenders.

[356 NLRB No. 163, slip op. at pp. 2, 11.]

On January 16, 2006, during the term of the Painters' agreements, G/M and the Carpenters entered into the 2005 -2007 Southwest Regional Council of Carpenters Arizona Drywall/Lathing Memorandum Agreement ("2005 MOA").[2] The 2005 MOA bound G/M to the 2002 Master Agreement and "any extensions, renewals or subsequent Master Agreements." When a new Master Agreement was entered into, effective July 1, 2006, G/M became bound to the 2006-2010 Southern California/ Arizona/Nevada Drywall/Lathing Master Agreement ("2006 Master Agreement"). The 2006 Master Agreement continued to waive coverage over the tapers' and painters' work performed by G/M's employees for as long as G/M had a labor agreement with the Painters covering such work. In particular, the 2006 Master Agreement in Article I, Section 7(g) stated:

> The Union understands and recognizes that the WWCCA and its members are signatory to a collective bargaining agreement with the painters and/or plaster tenders covering drywall finishing and wet wall finish work. The parties agree that Article I, Section 7 [the work covered clause] shall apply only to those signatory employers who are not already signatory to a collective bargaining agreement with the Painters and/or Plaster Tenders covering the drywall finishing or wet wall finish work as described in Article I, Section 7 of the agreement and who chose to assign that work to the Painters and/or Plaster Tenders. The Union agrees not to invoke or enforce Article I, Section 7 or to create any jurisdictional dispute concerning the work described in that section against any signatory employer that is also signatory to an agreement with the Painters and/or Plaster Tenders covering the drywall finishing or wet wall finish work and who chooses to assign that work to the painters and/or plasterers and plaster tenders, ***as long as such contract remains in effect***.

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[2] Referred to as the "2006 MOA" in the Board's Decision. [356 NLRB No. 163, slip op. at p. 2.]

[356 NLRB No. 163, slip op. at p. 2.]

G/M's agreements with the Painters expired on March 31, 2007.

B. The April 2, 2007 Meeting At The Marriott Hotel

On April 1, the day after G/M's agreements with the Painters expired, Morrison called Carpenters' representative Mike McCarron and asked him to set up a meeting so that the Carpenters could explain their benefits and pension to G/M's painters and tapers. [356 NLRB No. 163, slip op. at pp. 3, 13; Tr. 174-175, 192, 195, and 203.]

Carpenters' representatives set up the meeting for 2:00 p.m. on Monday, April 2, at the Marriott Hotel. G/M's representatives had nothing to do with the time or location of the meeting. They did not arrange for the room where the meeting was to be held and did not pay for the hotel or any other expenses associated with the meeting. [356 NLRB No. 163, slip op. at pp. 13; Tr. 78-79, 105, Tr. 184, 202-204, Joint Exhibit 19.]

After being advised of the meeting's details, G/M's representatives informed their painters and tapers about the meeting telling them that the Carpenters were going to make a presentation about their benefits. [Tr. 30, 78-79.] The meeting was not held during "work time." [Tr. 56, 104.] While employees may have been told they needed to attend the meeting to understand what the Carpenters' benefits were, the meeting was not mandatory and they were not ordered to attend. [356 NLRB No. 163, slip op. at p. 13; Tr. 30, 56, 78-79, 104, 127, 149.]

The meeting at the Marriott hotel started at about 2:00 p.m. and lasted at most one and one-half hours. It was held in a large room that was about 75 feet by 50 feet. The meeting was attended by about 15 Carpenters' representatives, 3 Cigna Healthcare representatives, and the 3 principals of G/M. [356 NLRB No. 163, slip op. at p. 13.]

Certain Carpenters' representatives were seated at the front of the room at a "presenters" table, a "prize" table was in front of them, the three owners of G/M were seated apart from the Carpenters' representatives at tables facing them, and the taper and painter employees were seated behind the owners' tables. At the opposite end of the room and about 65 feet away from where G/M's representatives were seated were two tables, one for Carpenters' representatives and another one for Cigna and trust fund representatives. [356 NLRB No. 163, slip op. at pp. 13; Tr.

81-82, 107-109, 110, 233, Employer Exhibit 1.]

McCarron commenced the meeting by going to the podium and giving a presentation about the Carpenters' union, its history, structure, size, and organizing efforts. Morrison was then invited to speak and said that the company had not reached an agreement with the Painters, that the Carpenters had a lot to offer and they wanted to present their benefits package, and stated that "we think this is a good deal." [356 NLRB No. 163, slip op. at p. 13; Tr. 82, 83, 231, 232, 272, Joint Exhibit 15, pages 1-11.]

After Morrison spoke, Ron Schoen (Carpenters' trust benefit administrator) shared a PowerPoint presentation of the Carpenters' pension and healthcare benefits explaining that the Carpenters had arranged for "instant" benefits eligibility. After this presentation, there was a question and answer period during which the taper and painter employees asked questions. At some point, Morrison talked about his experience in transferring from the Painters' benefits to the Carpenters' benefits and explained that this transition went smoothly. Employees then started talking among themselves and followed with more questions to the Carpenters' representatives. The employees' questions dealt mostly with health insurance and pension issues and most of the meeting was spent talking about "the pension and insurance options." At no time did any of G/M's representatives respond to any employee questions. [356 NLRB No. 163, slip op. at pp. 13-14; Tr. 83, 84, 161, 164, 188, 233, 234, Joint Exhibit 15, pages 12-28.]

After employees finished asking their questions, McCarron told them that there were Carpenters' representatives at the tables in the back of the room with "information packages and stuff." Employees then went to the tables at the back of the room to talk to the representatives stationed there. At the tables, employees signed medical insurance and benefit cards and forms and Carpenters' authorization cards. G/M's representatives, who were about 60 to 70 feet away, were unaware that employees were signing authorization cards and, could not hear what was being said and could not see what employees were filling out or signing at these tables. Moreover, no one from the Carpenters had ever informed G/M's representatives that the Carpenters would be asking employees to sign authorization cards at this meeting. [356 NLRB No. 163, slip op. at p. 14; Tr. 59, 85, 104, 110, 155, 165, 188, 189, 204-206, 233-234, 247-248,

284-285, Joint Exhibit 15, page 27.]

After employees had finished talking to the representatives at the two tables in the back and filling out forms, Hubel approached Morrison and showed him approximately 17 Carpenters' authorization cards and told him that the Carpenters had a "majority." About 23 tapers and painters were employed by G/M at the time of this meeting. Hubel and Morrison then signed a "Recognition Agreement" and a 2007 -2010 Southwest Regional Council of Carpenters Arizona Drywall/Lathing Memorandum Agreement (hereinafter "2007 MOA") which Hubel gave to Morrison. Hubel explained that he wanted Morrison to sign the "Recognition Agreement" to acknowledge that the Carpenters had authorization cards from a majority of the painters and tapers. Hubel also asked Morrison to sign the 2007 MOA after explaining that, except for the term, it was basically the same contract as the existing contract (2005 MOA) that expired in 2007. [356 NLRB No. 163, slip op. at p. 14; Tr. 88, 189, 190-191, 206, 234-235, 235-236, General Counsel Exhibits 4 and 5, Joint Exhibits 3 and 4.]

The ALJ found that the "authorization card signing was unseen by, and unknown to, the [G/M] owners who had remained in the front of the room. The [G/M] managers could not have seen what, if anything, the employees were signing, because their view was blocked by the employees at the tables. The only signing that had been discussed publicly was the necessity of signing the health insurance forms." [356 NLRB No. 163, slip op. at p. 14 (emphasis added).] These findings were not disturbed by the Board's Decision.

II. LEGAL ARGUMENT

A. RECONSIDERATION IS WARRANTED BECAUSE G/M DID NOT ENGAGE IN UNLAWFUL SURVEILLANCE AT THE APRIL 2 MEETING.

In the Complaint, the General Counsel alleged that G/M (through Chris Morrison, Travis Garner and Chris Garner) at the April 2 meeting, violated Section 8(a)(1) by engaging in the surveillance of employees' union activities, informing employees that it would be futile to select the Painters as their bargaining representative, and promising employees improved benefits if they selected the Carpenters as their bargaining representative.

The ALJ dismissed the above allegations and, except for the unlawful surveillance allegation (and the April 9 interrogation allegation remanded to the ALJ), the Board in its Decision and Order affirmed the ALJ's dismissal. [356 NLRB No. 163, slip op. at pp. 3-4, and p. 3, fn. 7.] In finding that G/M engaged in unlawful surveillance at the April 2 meeting, the Board found it unnecessary to pass on the ALJ's finding that G/M's representatives "positioned in the front of the room were unable to see what the employees were signing." [356 NLRB No. 163, slip op. at p. 3, fn. 8.] The Board found that "even assuming the Garner/Morrison executives could not see the exact documents that were signed, their presence in the room while the employees were being solicited to sign the Carpenters' documents constituted unlawful surveillance for the purpose of influencing employees to switch their allegiance to the Carpenters." [356 NLRB No. 163, slip op. at p. 5.]

In support of its unlawful surveillance finding, the Board relied on Moorehead City Garment Co., 94 NLRB 245, 255 (1951), enfd. 191 F.2d 1021 (4th Cir. 1951). Moorehead, however, does not support a finding of unlawful surveillance herein. Moorehead is readily distinguishable for the following reasons: First, unlike in Moorehead, G/M's representatives were at the April 2 meeting at the invitation of the Carpenters' representatives. Second, unlike in Moorehead, G/M's painters and tapers attended the April 2 meeting knowing that G/M's representatives would be present at the April 2 meeting. Third, notwithstanding the actual presence of G/M's representatives at this meeting, the painters and tapers openly engaged in "union activities" at this meeting unlike in Moorehead. Fourth, unlike in Moorehead, the undisputed evidence clearly shows that G/M's representatives were unaware that the Carpenters would be soliciting authorization cards at the April 2 meeting.[3] Based on the foregoing, the Board's citation to Moorehead does not support a finding of unlawful surveillance herein.

Instead, as G/M contended before the Board, there was no unlawful surveillance at the April 2 meeting because an "an employer's observation of employees' organizational activities

[3] While the Board in its Decision states that G/M "set up the meeting so that the Carpenters could recruit the painters and tapers" [356 NLRB No. 163, slip op. at p. 5.], the Board's statement attributes the Carpenters' purpose for having the meeting to G/M, and does so without any supporting evidence since, as the ALJ found, the evidence established that the purpose for the meeting from G/M's perspective was to discuss health coverage for its employees. See 356 NLRB No. 163, slip op. at pp. 13 and 14.

does not violate the Act where "employees elect to conduct their organizational activity openly." Sunshine Piping, Inc., 350 NLRB 1186, 1194 (2007). While the Board rejected this contention, its rationale for doing so is unwarranted. The Board rejected this contention because it concluded that the "employees here did not elect to conduct their organizational activities openly." [356 NLRB No. 163, slip op. at p. 5.] First, the Board's rejection is based on its ignoring the evidence herein. Thus, the Board stated that G/M did not "inform the employees of the meeting's purpose." [356 NLRB No. 163, slip op. at p. 5.] It is, however, undisputed that G/M's representatives informed their tapers and painters about the meeting telling them that the Carpenters were going to make a presentation about their benefits. [Tr. 30, 78-79.] As the ALJ found, G/M's representatives informed employees that they should attend the meeting "since it affected their health coverage." [356 NLRB No. 163, slip op. at p. 13.] Second, the Board's rejection is based on its unwarranted conclusion that the "employee's attendance at this meeting does not reflect their choice to participate in open organizational activity." [356 NLRB No. 163, slip op. at p. 5.] This conclusion is not supported by the record inasmuch as the undisputed evidence establishes that employees voluntarily attended this meeting as their attendance was not mandatory, and employees engaged in "union activities" in signing authorization cards while G/M's representatives were present.

Clearly, the painters' and tapers' union activities at the April 2 meeting were conducted openly and the Board's citation to Moorehead does not support a finding of unlawful surveillance herein. Accordingly, reconsideration by the Board is warranted.

B. EVEN ASSUMING ARGUENDO THAT THE BOARD'S FINDING OF UNLAWFUL SURVEILLANCE IS CORRECT, RECONSIDERATION IS WARRANTED BECAUSE THE BOARD IGNORED ITS HOLDING IN COAMO KNITTING MILLS, INC., 150 NLRB 579 (1964) IN FINDING THAT THE AUTHORIZATION CARDS WERE TAINTED.

In its Decision, the Board, on the basis of its finding of unlawful surveillance at the April 2 meeting, concluded that such surveillance "tainted" the authorization cards solicited by the Carpenters and "tainted' their acquisition of majority status. [356 NLRB No. 163, slip op. at p. 5.] As a result, the Board found that G/M unlawfully assisted the Carpenters by extending recognition to the Carpenters based on the authorization cards signed at the April 2 meeting. [356

NLRB No. 163, slip op. at p. 5.-6]

Even assuming arguendo that the Board's finding of unlawful surveillance was correct, its Decision that the purported surveillance somehow tainted the authorization cards is unsupported by law or facts. The Board found the cards "tainted" in the absence of any evidence that any of the painters or tapers were coerced or even influenced to sign authorization cards by the presence of G/M's representatives. The General Counsel's own witnesses testified that they experienced no coercion and were not influenced by the presence of G/M's representatives. [Tr. 39 (Servis); Tr. 161-162 (Porch).] Despite the presence of G/M's representatives at the meeting, at least four employees refused to sign authorization cards. [Tr. 57.]

Aside from the foregoing, the Board's Decision ignores the Board's own controlling precedent in Coamo Knitting Mills, Inc., 150 NLRB 579 (1964). Coamo is directly on point, and the Board failed to distinguish Coamo in finding that the presence of G/M's representatives "tainted" the authorization cards signed at the April 2 meeting. In doing so, the Board's Decision cavalierly dismissed the ALJ's finding that the "Garner/Morrison executives positioned in the front of the room were unable to see what the employees were signing" as unnecessary to its analysis. [356 NLRB No. 163, slip op. at p. 3, fn. 8.][4] Likewise, the Board ignored undisputed evidence and the ALJ's finding that G/M's representatives were completely unaware that the Carpenters' representatives were soliciting authorization cards at the April 2 meeting from G/M's painters and tapers, and that such solicitation was not seen by G/M's representatives. See 356 NLRB No. 163, slip op. at p. 14 ("The authorization card signing was unseen by, and unknown to, the Garner owners who had remained in the front of the room"); Tr. 110, 189, 204-206, 284-285, Employer Exhibit 1.

Irrespective of whether G/M's presence can be characterized as unlawful surveillance, the Board in Coamo expressly held that the presence of employer representatives at a union meeting where employees signed authorization cards was not sufficient to taint the cards obtained by the

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[4] As noted above, the ALJ found that G/M's representatives "could not have seen what, if anything, the employees were signing, because their view was blocked by the employees at the tables. The only signing that had been discussed publicly was the necessity of signing the health insurance forms." [356 NLRB No. 163, slip op. at p. 14]

union at such meeting. Thus, the Board stated in Coamo:

> The Trial Examiner attached critical importance to Galinanes' [company representative] presence at the July 17 meeting which, he found, 'necessarily had a coercive effect' on the employees present. The record does not support this conclusion. It is admitted that Galinanes was not standing in a position that would have enabled him to observe individual employees signing cards. To the contrary, Galinanes credibly testified that during the meeting, he stood on the floor apart from the employees, and that he could not and did not see any employees signing the cards. Galinanes further testified that, and the Trial Examiner found, that management made no attempt to ascertain which employees even attended the meeting.
>
> We deem this evidence insufficient to support a finding that the mere presence of Galinanes at the meeting had the effect of coercing employees in their selection of the Union, thus tainting the majority status at the conclusion of this meeting."

Coamo, supra, 150 NLRB at pp. 581-582 (emphasis added). Clearly, the Board's finding that the presence of G/M's representatives at the April 2 meeting tainted the authorization cards collected by the Carpenters' representatives cannot be reconciled with the Board's decision in Coamo, which G/M submits is controlling authority herein.

The Board's decision in Coamo has not been overruled, and it is directly applicable herein. It is undisputed that G/M's representatives were not aware that the Carpenters' representatives intended to solicit authorization cards at the April 2 meeting. Moreover, like the employer representatives in Coamo, it is undisputed that G/M's representatives were not in a position to observe the authorization card signing at the April 2 meeting. This latter factor prompted the Board in Coamo to conclude that the authorization cards obtained by the union at a meeting at which employer representatives were present were not tainted and that the employer did not violate Sections 8(a)(2) and (1) in extending recognition on the basis of those cards. The same result is compelled herein, especially when there is no evidence that any employee experienced or felt coerced into signing an authorization card.

Based on the foregoing, G/M submits that reconsideration is warranted because the Board ignored controlling authority under Coamo in finding that the authorization cards were tainted and that G/M violated Section 8(a)(2) and (1) by recognizing the Carpenters on the basis of such cards.

C. EVEN ASSUMING G/M VIOLATED SECTIONS 8(A)(2) AND (1) ON APRIL 2, 2007, RECONSIDERATION IS NECESSARY BECAUSE THE AGREEMENT BETWEEN G/M AND THE CARPENTERS COVERED G/M'S PAINTERS AND TAPERS ON AN 8(F) BASIS, AND THE BOARD'S REMEDY AND ORDER INVALIDATING THIS SECTION 8(F) AGREEMENT VIOLATES THE STATUTE AND CONTROLLING PRECEDENT.

At the hearing before the ALJ, G/M contended that prior to the April 2 meeting, the Carpenters were the Section 9(a) representative of G/M's painters and tapers. The ALJ found merit to this contention in concluding that, as a result of the Painters' exception in the agreement between G/M and the Carpenters that pre-dated the April 2 meeting, the Carpenters had a "colorable claim" to Section 9(a) status vis-à-vis G/M's painters and tapers upon expiration of the Painters' agreements on March 31, 2007. The Board rejected the ALJ's finding. [356 NLRB No. 163, slip op. at p. 6, 18.] G/M continues to contend that the Carpenters were the Section 9(a) representative of its painters and tapers upon expiration of the Painters' agreements. Even if G/M's contention is ultimately shown to be erroneous, the Board failed to consider that application of G/M's agreement with the Carpenters (via the 2005 MOA and 2006 Master Agreement) to the painters and tapers on April 1 (after expiration of the Painters' agreements), created a Section 8(f) relationship vis-à-vis those employees. Because a Section 8(f) relationship would impact the Board's Remedy and Order prohibiting G/M from recognizing the Carpenters as even the Section 8(f) collective bargaining representative of the painters and tapers, absent a Board certification, reconsideration of the Board's Decision is warranted.

The Board, in rejecting G/M's Section 9(a) defense, assumed that what occurred upon expiration of the Painters' agreements on March 31, 2007, was a merger of the painters and tapers and the carpenters into one unit. The merger of these bargaining units is a necessary predicate for the Board's finding. Aside from the fact that the General Counsel never alleged or pursued a violation based on what occurred on April 1, 2007, when the painters and tapers became covered by the 2005 MOA and 2006 Master Agreement between G/M and the Carpenters, there is no evidence that G/M merged (or intended to merge) these two separate bargaining units into one bargaining unit prior to April 2, 2007. It was only after Carpenters' representatives presented authorization cards on April 2 from the painters and tapers that G/M recognized the Carpenters in

one bargaining unit comprised of all of G/M's carpenters, painters and tapers.

What the evidence does show is that upon expiration of the Painters' agreements, the Carpenters' 2005 MOA and 2006 Master Agreement automatically applied to the painters and tapers formerly represented by the Painters. Under Deklewa, the Board presumes that parties in the construction industry intend their relationship to be an 8(f) relationship. Deklwewa, supra, 282 NLRB at 1385 fn. 41 (1987). In reaching the result herein, and rejecting G/M's Section 9(a) contention, the Board ignored this 8(f) presumption and instead presumed that application of the Carpenters' 2005 MOA and 2006 Master Agreement to the painters and tapers could only be done on a Section 9(a) basis. Such presumption and analysis runs counter to established Board precedent in the construction industry.

The Board's decision in Comtel Systems Technology, Inc., 305 NLRB 287 (1991), holds that, in the construction industry, a Section 9(a) agreement applied to a separate bargaining unit is applied on an 8(f) basis. While Comtel involved an employer who became bound to a multi-employer association Section 9(a) agreement, the critical factor in Comtel was not the identity of the employer, but the fact that the agreement was being applied to a separate bargaining unit. Like the employer's separate bargaining unit in Comtel, the separate bargaining unit of G/M's painters and tapers became covered by the Carpenters' agreement with G/M. The Board's decision in Comtel fully supports the position that an agreement can be 9(a) vis-à-vis one bargaining unit and 8(f) with respect to another unit.

The fact that the agreement between the Carpenters and G/M contains Staunton Fuel[5] language, while not irrelevant, is not determinative. In Madison Industries, Inc., 349 NLRB 1306, 1309 fn. 13 (2007), the Board refused to "pass on whether unambiguous language alone is sufficient to establish Sec. 9 status." Moreover, there is no "positive evidence" that G/M and the Carpenters intended to create a 9(a) relationship as to the painters and tapers when they became automatically covered by the 2005 MOA and 2006 Master Agreement on April 1. Before such an intention can be found, the Board requires "positive evidence that the union sought and the employer extended recognition to a union as the 9(a) representative of its employees before

[5] Staunton Fuel & Material, Inc. d/b/a Central Illinois Construction, 335 NLRB 717 (2001).

concluding that the relationship between the parties is 9(a) and not 8(f)." See J & R Tile, 291 NLRB 1034, 1036 (1988). While there may be evidence that Carpenters' representatives considered that the painters and tapers were part of an overall Section 9(a) unit, there is no evidence that, at any time prior to April 2, 2007, the Carpenters demanded recognition based on majority status and that G/M granted Section 9(a) status to the Carpenters as to its painters and tapers.

Based on the foregoing, and the fact that the Board did not rule otherwise, a lawful Section 8(f) agreement between G/M and the Carpenters covering the painters and tapers existed as of April 1, 2007. Even if G/M engaged in subsequent conduct violative of Section 8(a)(2) on April 2, this would not invalidate this pre-existing Section 8(f) agreement under applicable Board precedent. A Section 8(f) agreement continues to remain valid where the 8(a)(2) assistance or support occurred wholly after the parties had already executed their Section 8(f) agreement. Zidell Explorations, Inc., 175 NLRB 887 (1969). Thus, in Zidell, the Board stated that,

> [We] do not read Section 8(f) as permitting, much less as requiring, the invalidation of a prehire contract, allowable under that Section and valid when entered into, simply because of subsequent acts of unlawful assistance for which the employer party to the contract has alone been found responsible . . . Section 8(f), if it is true, imposes as one of the conditions that an employer may "make" such an agreement only with a labor organization "not established, maintained, or assisted by any action defined in Section 8(a) of the Act as an unfair labor practice." That condition, however, speaks only as of the time of the making of the contract and obviously refers to antecedent unfair labor practices.

Id. at 888 (emphasis in original). See also Luke Construction Company, 211 NLRB 602, 605 (1974) (post 8(f) contract assistance not a proper basis for ordering withdrawal of recognition or rescission of an otherwise valid Section 8(f) agreement).

Because the Board has not ruled on whether G/M had a valid pre-existing Section 8(f) agreement, reconsideration is warranted given the prohibition of even a Section 8(f) agreement set forth in the Board's Remedy and Order. Even if the 2005 MOA and 2006 Master Agreement did not apply to the painters and tapers on a Section 9(a) basis, under Comtel, the agreement applied to these employees on a Section 8(f) basis. Based on the foregoing, reconsideration of the Board's Decision is warranted.

D. RECONSIDERATION IS WARRANTED BECAUSE THE BOARD'S REMEDY AND ORDER PROHIBITING G/M FROM RECOGNIZING THE CARPENTERS AS THE REPRESENTATIVE OF G/M'S PAINTERS AND TAPERS UNTIL THE CARPENTERS HAVE BEEN CERTIFIED BY THE BOARD IS CONTRARY TO THE STATUTE AND APPLICABLE PRECEDENT, AND IS PUNITIVE.

Based on its findings that G/M violated Sections 8(a)(2) and (1), the Board's Remedy and Order prohibit G/M from recognizing the Carpenters as the exclusive collective bargaining representative of G/M's painters and tapers until the Carpenters has been certified as such by the Board. [356 NLRB No. 163, slip op. at p. 7.] The Board's Order is unwarranted because it is vague and also exceeds the Board's statutory authority because it is punitive.

Under the Act, the Board has the power to issue an order requiring a party who has committed an unfair labor practice to "cease and desist from such unfair labor practice and to take such affirmative action ... as will effectuate the policies of the Act." 29 U.S.C. § 160(c). This statutory command has been interpreted "as vesting in the [NLRB] the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review." Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 898-99 (1984). The Board's Order, however, cannot stand if it is "shown that the order is a patent attempt to achieve ends other than those that can be fairly said to effectuate the policies of the Act." NLRB v. International Association of Bridge, Structural & Ornamental Iron Workers, Local 433, 600 F.2d 770, 777-78 (9th Cir.1979), cert. denied, 445 U.S. 915 (1980). Moreover, the Board may not issue a remedial order that is unclear and fails to inform the respondent of what conduct is prohibited. NLRB v. National Garment Co., 166 F.2d 233 (8th Cir. 1948). Additionally, the NLRB lacks authority to punish and its remedy must not be punitive in nature. Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940) ("The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes.").

As the Board in Deklewa noted, a union signatory in the construction industry possesses a "limited 9(a) representative status" under Section 8(f). Deklewa, supra 282 NLRB at 1387. Because the Board's decision in Deklewa permits the Carpenters to enjoy such limited Section 9(a) status vis-à-vis G/M's painters and tapers, the Board's Order is vague because it fails to inform G/M of what conduct it is prohibited from engaging in the future. Thus, it is unclear from

the Board's Order whether G/M is only prohibited from recognizing the Carpenters as the exclusive bargaining representative under Section 9(a), or whether the Board's prohibition also prohibits G/M from recognizing the Carpenters as a limited Section 9(a) representative under Section 8(f). Because the Board's Order is unclear and vague, reconsideration by the Board is warranted.

Moreover, "[i]t is the Board's practice to remedy violations by restoring, to the extent feasible, the status quo ante, reconstructing the circumstances that would have existed but for the lawful conduct." Rochester Manufacturing Co., 322 NLRB 260, 263 (1997). To the extent the Board's Order prohibits G/M and the Carpenters from entering into any Section 8(f) agreement in the future covering G/M's painters and tapers, the Board's Order goes beyond reconstructing the circumstances that would have existed absent the violations found by the Board. The Board's Order does not restore the *status quo ante* because the *status quo ante* would have permitted G/M and the Carpenters to enter into an 8(f) agreement covering the painters and tapers.

Aside from the foregoing, to the extent that the Board's Order would forever preclude G/M and the Carpenters from entering into an agreement covering the painters and tapers, absent a Board certification that the Carpenters is the exclusive collective bargaining representative under Section 9(a), the Board's Order is punitive in nature. Because a plain reading of Section 8(f) clearly reveals Congress' intent in permitting unions and employers to enter into non-majority collective bargaining agreements, the Board's Order is inconsistent with the unambiguous text of Section 8(f). Where a statute's meaning is plain, the Board "must give effect to the unambiguously expressed intent of Congress." Holly Farms Corp. v. NLRB, 517 U.S. 392 (1996). The Board has clearly not done so in this matter.

In Zidell, supra 175 NLRB at 888, the Board stated:

> "Section 8(f), it is true, imposes as one of its conditions that an employer may 'make' such an agreement only with a labor organization 'not established, maintained or assisted by any action defined in Section 8(a) of the Act as an unfair labor practice.' That condition, however, speaks only as of the time of the making of the contract."

(Emphasis added.) The Board's own construction of Section 8(f) in Zidell therefore establishes that G/M and the Carpenters could lawfully enter into a Section 8(f) agreement covering the

drywall finishing employees at some future date so long as at the time of entering into the agreement there was no unlawful assistance. Thus, if G/M indeed violated Sections 8(a)(2) and (1) by entering into a 9(a) collective bargaining agreement covering its painters and tapers on April 2, 2007, as found by the Board, after otherwise remedying these violations, G/M (and the Carpenters) should not be barred forever from entering into a Section 8(f) agreement covering these employees. Here, the Board has inexplicably ignored applicable precedent and the statute itself. As a result, its Remedy and Order cannot be enforced. Cleveland Construction Co. v. NLRB, 44 F.3d 1010, 1016 (D.C. Cir. 1995) (Board cannot ignore its own relevant precedent, but rather must explain why it is not controlling). Moreover, as noted by the Supreme Court in Republic Steel, supra, 311 U.S. at 10, the Act does not impose "death penalties" or "life sentences" for its violations and, as a result, the Board's Remedy and Order is punitive and unwarranted requiring reconsideration by the Board.

E. RECONSIDERATION BY THE BOARD IS WARRANTED BECAUSE THE BOARD'S DECISION REMANDS THE APRIL 9, 2007 INTERROGATION ALLEGATION TO THE ALJ EVEN THOUGH THE ALJ ON REMAND ALREADY DISMISSED THIS ALLEGATION.

In its Decision, the Board remanded the alleged April 9 interrogation of Gary Servis by G/M's part-owner Chris Morrison to the ALJ. [356 NLRB No. 163, slip op. at p. 6]. The Board did so even though the ALJ, upon remand by the initial two-member Board panel in Garner/Morrison, LLC, 353 NLRB 719 (2009), dismissed this allegation. See ALJ James M. Kennedy's "Decision on Remand" in Garner/Morrison, LLC, JD (SF)-15-09, dated April 13, 2009. Given the foregoing, reconsideration is necessary to clarify whether the Board intended the ALJ to decide this interrogation anew or whether the Board's remand was inadvertent.

III. CONCLUSION

For the reasons noted above, Garner/Morrison, LLC requests that its motion for reconsideration be granted, and that the Board reconsider its Decision and Order herein.

Respectfully submitted,

DATED: June 27, 2011

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CERTIFICATE OF SERVICE

I, Richard S. Zuniga, declare as follows:

1. I hereby certify that on June 27, 2011, I filed **RESPONDENT GARNER/MORRISON, LLC'S MOTION FOR RECONSIDERATION** in Cases 28-CA-21311 and 28-CB-6585, via E-Filing.

2. I hereby certify that on June 27, 2011, I caused to be served true copies of **RESPONDENT GARNER/MORRISON, LLC'S MOTION FOR RECONSIDERATION** in Cases 28-CA-21311 and 28-CB-6585, by first-class U.S. Mail and by E-Mail on the following parties:

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I hereby certify that the foregoing is true and correct. Executed this 27th day of June 2011, at Los Angeles, California.

Richard S. Zuniga

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